

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 11-431V

October 3, 2012

Not for Publication

LISA HART,

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Petitioner,

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v.

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Dismissal; failure to make a
prima facie case; failure to
prosecute

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SECRETARY OF HEALTH
AND HUMAN SERVICES,

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Respondent.

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Lisa Hart, Hagerstown, MD, for petitioner (pro se).

Michael P. Milmo, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION¹

On June 30, 2011, petitioner filed a petition seeking compensation under the National Childhood Vaccine Injury Act of 1986 (the "Act"), 42 U.S.C. § 300aa-10 *et seq.* (2006). Petitioner alleges that she suffered neurological symptoms as a direct result of having received a tetanus vaccine on July 3, 2008. Pet. at 2.

On August 10, 2011, former Special Master Lord convened the initial status conference in this case. During the conference, Special Master Lord discussed a time line with the parties for the submission of medical records. Petitioner indicated that she had been in contact with an attorney, but the attorney had not yet agreed to take her case. Petitioner requested additional

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would constitute a clearly unwarranted invasion of privacy. When such a decision is filed, petitioner has 14 days to identify and move to redact such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall redact such material from public access.

time to continue collecting medical records and to seek representation. Special Master Lord granted petitioner's request, affording her 60 days to file medical records. See Order, Aug. 25, 2011. A status conference was set for October 27, 2011.

On October 27, 2011, Special Master Lord convened the previously scheduled status conference. Petitioner stated that she had not yet retained an attorney and intended to proceed pro se. Special Master Lord directed petitioner to obtain pro se information from the Court's website. Special Master Lord ordered that another status conference be scheduled in approximately 60 days to discuss petitioner's progress in filing the required medical records and an affidavit, and retaining an attorney. See Order, Oct. 31, 2011. A status conference was set for January 10, 2012.

On January 10, 2012, Special Master Lord convened a status conference as scheduled. During the conference, petitioner indicated that she had discontinued her search for an attorney and had decided to proceed pro se. Petitioner stated that she had gathered her records and would submit them to the Court within 10 days. After additional discussion, respondent indicated that 90 days from the date of petitioner's submission of medical records would be sufficient time for her to submit a Rule 4(c) Report. Special Master Lord explained to petitioner the purpose of the Rule 4(c) Report and directed her to the Court's website to obtain additional helpful information. An order setting deadlines in accordance with this time line was issued on January 12, 2012. A status conference was set for April 19, 2012.

On January 23, 2012, petitioner filed an affidavit and medical records. See Ex. 1. Petitioner filed additional records on March 15, 2012. On April 19, 2012, respondent filed her Rule 4(c) Report. In her Report, respondent noted, "Petitioner has provided no evidence that tetanus was ever received" and requested that petitioner provide this documentation. Resp't's Rep. at 9. Additionally, respondent stated, "Petitioner has not yet submitted a report from a medical expert to support her cause-in-fact claim." Id. at 10. Respondent argued that without the opinion of a medical expert to support her claim, petitioner "has failed to establish by preponderant evidence that the alleged tetanus vaccine she may have received on July 3, 2008, caused her any injury." Id. at 10-11.

On April 19, 2012, Special Master Lord convened a status conference to discuss respondent's Rule 4(c) Report and the need for petitioner to retain a medical expert. Additionally, Special Master Lord noted respondent's request for "several important missing medical records." See Resp't's Rep. at 1 n.1. Special Master Lord explained the role of a medical expert and the need for one to be retained in this case. Special Master Lord informed petitioner that she would be afforded 60 days to file the requested records and retain a medical expert. Petitioner indicated she understood these requirements. An order setting deadlines in accordance with this time line was issued on April 24, 2012. A status conference was set for June 28, 2012.

Petitioner filed no additional medical records or a medical expert report. On June 28, 2012, Special Master Lord convened a status conference as scheduled. During the status conference, Special Master Lord asked petitioner whether she had obtained the required medical

records and retained a medical expert. Petitioner stated that she did not intend to move forward with her case. Special Master Lord then informed the parties that she would issue an order to show cause why this case should not be dismissed for insufficient proof and failure to prosecute. Special Master Lord explained to petitioner that if she did not respond to the order to show cause, her case would be dismissed. On July 2, 2012, Special Master Lord issued a Show Cause Order.

On August 2, 2012, the Show Cause Order issued July 2, 2012, was returned to the Office of Special Masters after it was not signed for at petitioner's address. Special Master Lord's law clerk left a voice message for petitioner upon the return of the Show Cause Order. Petitioner contacted Special Master Lord's chambers on August 6, 2012, and indicated that she had been out of town during the month of July. Special Master Lord's law clerk informed petitioner that the Show Cause Order would be resent to her. Special Master Lord granted Petitioner an additional 30 days, until Friday, September 8, 2012, to respond to the second Show Cause Order. Petitioner has not responded to Special Master Lord's August 9, 2012, Show Cause Order and has not filed any additional medical records or a medical expert report.

FACTS

Petitioner was born December 8, 1971.

She allegedly received a tetanus vaccine on July 3, 2008. No record of vaccination has been provided. Petitioner alleges that a few minutes after receiving the tetanus (DTaP) vaccine, she began to feel nauseated, hot, and dizzy, developed a bad taste in her mouth, and became weak. Affidavit Ex. 1, at 1. She was transported to the emergency room at Washington County Hospital. The emergency room triage note reported a diagnosis of a "local reaction to immunization." Med. recs. Ex. 1, at 9. Petitioner's examination was normal and she was released after being given an antihistamine. Id. at 10-13.

On July 10, 2008, petitioner returned to the emergency room complaining of a frontal headache. She was diagnosed with sinusitis and released. Id. at 49.

On July 21, 2012, petitioner went to Urgent Care complaining of feeling shaky, tired, dizzy, nauseated, and anxious after receiving a tetanus shot two weeks earlier. Id. at 44. She was diagnosed by Dr. Robert Vandenbosche with "new onset of anxiety, mild." Id. at 45.

On July 25, 2012, petitioner had head and sinus CT scans for headaches and blurred vision. Id. at 41-42. Dr. Kerri Hesley noted that petitioner had a history of a fall five weeks prior. Id. at 42. Petitioner's sinus CT revealed mild mucosal thickening and a spur projecting from the right side of the nasal septum, but her head CT was unremarkable. Id. at 41-42.

On August 7, 2008, petitioner saw Dr. Gene Tudor, an otolaryngologist, to rule out chronic sinus disease. He noted that petitioner appeared anxious and "very depressed" and struggled to articulate a coherent history. Id. at 36. Her exam found "no evidence of clinically

significant sinus disease” and Dr. Tudor suggested that petitioner would benefit from a psychiatric evaluation, which she refused. Id.

On August 8, 2008, petitioner presented to the emergency room with complaints including nausea, dizziness, and weakness, which she attributed to her vaccination. Id. at 54. Her exam was normal, as was an EKG. Id. at 55. Dr. Stephen Kotch’s impression was “anxiety and dizziness.” Id. at 56. Petitioner was again referred to psychiatric services but refused to be seen. Id.

Dr. Tarek El-Sherif, a cardiologist, saw petitioner on August 14, 2008. Dr. El-Sherif found that petitioner had heart palpitations, which he determined were probably due to pain and anxiety. He concluded that her “constellation of symptoms are not explainable by any single diagnosis.” Id. at 133.

Petitioner was evaluated by Dr. Jamal Ali, a neurologist, on August 21, 2008, with complaints of muscle spasms, chest tightness, and muscle achiness following a tetanus shot. Id. at 7. After a normal exam, Dr. Ali wrote that although the temporal association of petitioner’s symptoms and the tetanus vaccine is suggestive of a vaccine reaction, he would like to rule out other causes. Id. at 8.

Petitioner again visited Dr. Ali on September 19, 2008, with complaints of muscle spasms, light headedness, tremors in the upper extremities, fatigue, and weakness. Id. at 6. Dr. Ali reported that petitioner had been seen at Johns Hopkins and had been prescribed an antidepressant, which she did not take. Id. at 5. Petitioner’s examination was normal. Id. at 6. Dr. Ali did not believe that any serious neurological problems were being missed and concluded that “anxiety is playing [a] role in her symptoms.” Id.

On October 29, 2008, petitioner was seen by Dr. Alan Vinitsky, the owner of Enlightened Medicine and an internist and pediatrician. Dr. Vinitsky found petitioner’s case to be “very complex” and concluded that petitioner may have had chronic carbon monoxide exposure from an exhaust pipe leak during the same time period as her vaccine exposure. Id. at 168.

Petitioner saw chiropractor Mark Feimuth on May 20, 2009. He diagnosed petitioner with nonallopathic lesions, muscle spasms, tension headaches, myalgia, and malaise. Id. at 82.

On September 14, 2009, petitioner was seen by Dr. Samuel Rao. She related her symptoms to the tetanus vaccine in her history. Dr. Rao was unable to make an exact diagnosis. Id. at 152.

Petitioner was evaluated by Dr. CheunJu Chen, a neurologist, on February 8, 2010. She complained of headaches, blurred vision, dizziness, and myalgia. Id. at 139. After the neurologic evaluation, Dr. Chen was “unable to explain [all] of her symptoms.” Id.

Petitioner returned to Dr. Rao on September 27, 2010. Dr. Rao did not believe that significant disease was the cause of her symptoms. He suspected somatization disorder as the cause of petitioner's complaints. Id. at 148.

On May 2, 2012, petitioner was seen at the Center for Dizziness & Balance Disorders. Dr. Michael DeCrisco ordered vestibular diagnostic testing but no records from that testing were provided. The most recent filed medical records are dated May 2, 2012.

DISCUSSION

To satisfy her burden of proving causation in fact, petitioner must prove by preponderant evidence: "(1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of a proximate temporal relationship between vaccination and injury." Althen v. Sec'y of HHS, 418 F.3d 1274, 1278 (Fed. Cir. 2005). In Althen, the Federal Circuit quoted its opinion in Grant v. Sec'y of HHS, 956 F.2d 1144, 1148 (Fed. Cir. 1992):

A persuasive medical theory is demonstrated by "proof of a logical sequence of cause and effect showing that the vaccination was the reason for the injury[.]" the logical sequence being supported by "reputable medical or scientific explanation[.]" i.e., "evidence in the form of scientific studies or expert medical testimony[.]"

Without more, "evidence showing an absence of other causes does not meet petitioners' affirmative duty to show actual or legal causation." Grant, 956 F.2d at 1149. Mere temporal association is not sufficient to prove causation in fact. Id. at 1148.

Moreover, a special master may not find that a petitioner is entitled to compensation solely "based on the claims of the petitioner alone, unsubstantiated by medical records or by medical opinion." 42 U.S.C. § 300aa-13(1); see Lett v. Sec'y of HHS, 39 Fed. Cl. 259, 260-61 (1997) ("Ultimately, the petitioner must substantiate the occurrence of a compensable, vaccine-related injury with independent evidence.").

Petitioner must show not only that but for the vaccine, she would not have had neurological injuries, but also that the vaccines were a substantial factor in causing her neurological injuries. Shyface v. Sec'y of HHS, 165 F.3d 1344, 1352 (Fed. Cir. 1999). She has not done this. Petitioner has not provided preponderant evidence that tetanus vaccine can cause any of the injuries she alleges nor has she provided preponderant evidence that tetanus vaccine did in fact cause her injuries. Moreover, petitioner has not demonstrated that she received a vaccination on the Vaccine Injury Table as required by 42 U.S.C. § 300aa-13(c)(1)(A).

The Vaccine Act does not permit the undersigned to rule in favor of petitioner based only on her allegations unsupported by medical records or medical opinion. 42 U.S.C. § 300aa-13(a)(1).

Furthermore, petitioner has failed to prosecute her case. In a June 28, 2012, status conference, petitioner informed Special Master Lord that she no longer intended to move forward with her case. Special Master Lord explained the significance of a show cause order and told petitioner that her case would be dismissed if she did not respond to the order. On July 2, 2012, Special Master Lord filed a Show Cause Order. On, August 9, 2012, Special Master Lord filed a second Show Cause Order after the first order was returned as undeliverable. Special Master Lord specifically stated in her August 9, 2012, Show Cause Order that if petitioner did not respond to the order by September 8, 2012, her case would be summarily dismissed for insufficient proof and failure to prosecute. Show Cause Order at 4. Petitioner did not respond to the Show Cause Order.

Petitioner's petition is **DISMISSED**.

CONCLUSION

Petitioner's petition is **DISMISSED** for failure to make a prima facie case and failure to prosecute. In the absence of a motion for review filed pursuant to RCFC Appendix B. the clerk of the court is directed to enter judgment herewith.²

IT IS SO ORDERED.

DATE

Laura D. Millman
Special Master

² Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.